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NADRAH AYUNI MOHD YUSOP v. RAHMAN LAPODIN; RHB BANK BHD/RHB ISLAMIC BHD & ORS (GARNISHEES)

HIGH COURT SABAH & SARAWAK, SANDAKAN
CELESTINA STUEL GALID J
[CIVIL APPEAL NO: SDK-11A-1-10-2023]
B 15 MARCH 2024

Abstract – *Pursuant to O. 49 r. 1 of the Rules of Court 2012, where a judgment creditor has obtained a judgment or order for the payment of money by a judgment debtor, not being a judgment or order for the payment of money into court, and any other garnishee within the jurisdiction, is indebted to the judgment debtor, the court may order the garnishee to pay the judgment creditor the amount of any debt due or accruing due to the judgment debtor from the garnishee, or so much thereof as is sufficient to satisfy that judgment or order and the costs of the garnishee proceedings.*

CIVIL PROCEDURE: *Judgments and orders – Garnishee order – Appeal against decision of Magistrates' Court – Judgment creditor obtained judgment against judgment debtor – Judgment creditor applied and obtained garnishee order for purpose of executing judgment – Magistrates' Court granted garnishee order absolute – Garnishees ordered to pay to judgment creditor – Whether there was evidence before Magistrates' Court which showed garnishees were indebted to judgment debtor – Rules of Court 2012, O. 49 r. 1*

The respondent, the judgment creditor ('JC'), had obtained a judgment against the respondent, the judgment debtor ('JD'), before the Magistrates' Court in the sum of RM62,248.25 and interests. The JC then applied for, and obtained, a garnishee order for the purpose of executing the judgment. Hence, the present appeal by the JD against the decision of the Magistrates' Court in granting the garnishee order absolute where the second garnishee, Maybank Islamic Bhd, was ordered to pay to the JC the sums of RM8,635.97 and RM31,330.54 and the fifth garnishee, Ambank Islamic Berhad, the sum of RM22. The question that arose for determination was, what was the evidence before the Magistrates' Court which showed that the second and fifth garnishees were indebted to the JD, as required under O. 49 r. 1 of the Rules of Court 2012 ('ROC').

Held (allowing appeal in part):

(1) It was pertinent to consider the applicable statutory provision, namely O. 49 r. 1 of the ROC. The Magistrate did not appear to have this provision in mind when he decided as he did. Both the second and fifth garnishees neither opposed nor took part in the proceedings. While it

was true that under O. 49 r. 4 of the ROC, if the garnishee did not attend or did not dispute the debt due or claimed to be due from him to the JD, the court may, subject to r. 7, make an order absolute against the garnishee, this did not relieve the court from first determining whether there was a debt due to the JD from the garnishee under r. 1. This was especially so in the present case when the JC did not even provide the grounds of his information and belief of the matters he averred, contrary to the requirement in Form 98 in the First Schedule of the ROC. (paras 4, 8, 10 & 11)

(2) It was the JD who disclosed that the second garnishee had written to her to inform that her saving accounts, in the sum of RM8,635.97 had been frozen. The letter from the second garnishee did not indicate that they had frozen the accounts in compliance with the garnishee order to show cause. However, it should have immediately raised a red flag to the Magistrate that there was no mention by the second garnishee in the said letter about the sum of RM31,330.54. This suggested that the second garnishee was not even sure that they were indebted to the JD in the said sum. The only evidence on this sum of RM31,330.54 was produced by the JD herself by exhibiting the bank statement of Legasi Bumiputera Enterprise. The JD said that this was not her personal bank account but a business account, which was not the same as the business she was trading in where she was sued by the JC earlier, namely Ayuni Optometri & Ayuni Housing Group. (paras 12 & 13)

(3) As there was no evidence before the Magistrates' Court on the identity of the account holder in which the said sum of RM31,330.54 was kept, the requirement under O. 49 r. 1 of the ROC, in as far as the said sum was concerned, was not fulfilled. It was also the same as regards the sum of RM22 purportedly due to the JD from the fifth garnishee. There was no basis for the Magistrate to grant the garnishee order absolute in as far as the said sums of RM31,330.54 and RM22 were concerned. (para 19)

(4) On the contention that it was the duty of the JD to show that the money in Legasi Bumiputera Enterprise belonged to someone else, this ignored the fact that it was the JC who bore the legal burden to persuade the court that there was: (i) a debt due to the JD from the garnishee; and (ii) a debt which was 'accruing due' to the JD from the garnishee to justify the garnishment of the sum of money in question. If the JC had not discharged that burden, then there was nothing for the JD to rebut. Here, the JD, having challenged the propriety of attaching the Legasi Bumiputera Enterprise account, the burden was on the JC to show that it was justifiable to garnish the money in that account by showing that it was liable to be attached in any event. The JC failed to discharge that burden. (para 28)

(5) The court ordered that, *inter alia*, (i) the decision of the Magistrates' Court, in granting the garnishee order absolute in respect of the said sums of RM31,330.54 and RM22 be set aside; (ii) the JC was to return the sums of RM31,330.54 and RM22 to the second and fifth garnishees, respectively; and (iii) the second and fifth garnishees were to reinstate the sums of RM31,330.54 and RM22 in the accounts from which the said sums were paid out. (para 31)

Case(s) referred to:

Bank Kerjasama Rakyat (M) Bhd v. Koperasi Serbaguna Iman Malaysia Bhd; Maybank Islamic Bhd & Ors (Garnishees) [2023] 2 CLJ 966 HC ***(dist)***

RT Telecom Sdn Bhd v. Telefleet Trading Group Sdn Bhd [2019] CLJU 2093; [2019] 1 LNS 2093 HC ***(refd)***

Tai Kwong Goldsmiths & Jewellers (In Receivership) v. Yap Kooi Hee & Ors [1994] 4 CLJ 959 SC ***(refd)***

Tesco Stores (Malaysia) Sdn Bhd v. Ananda Kumar Krishnan [2017] 5 CLJ 315 CA ***(refd)***

Tiong Hoo Teck v. Wong Ho Enterprise Sdn Bhd & Ors [2014] CLJU 272; [2014] 1 LNS 272 CA ***(refd)***

Legislation referred to:

Rules of Court 2012, O. 49 rr. 1, 4, 7, 8, O. 92 r. 4

For the appellant - Pg Amli Noraufe Pg Nohin; M/s Nohin & Partners
For the respondent/5th garnishee - Noor Ilienna Rahayu Ibrahim; M/s Ibrahim & Chang
For the 2nd garnishee - Chan Shing Loo; M/s Yap & Chin

Reported by Najib Tamby

JUDGMENT

Celestina Stuel Galid J:

Introduction

[1] The present appeal is by the judgment debtor ("JD") against the decision of the Magistrates' Court in granting the garnishee order absolute dated 29 September 2023, wherein the second garnishee, Maybank Islamic Berhad, was ordered to pay to the judgment creditor ("JC") the sums of RM8,635.97 and RM31,330.54 and the fifth garnishee, Ambank Islamic Berhad, the sum of RM22.

The Proceedings In The Court Below

[2] The JC had earlier on 8 March 2023, *inter alia*, obtained a judgment against the JD before the Magistrates' Court in the sum of RM62,248.25 and interest thereon.

[3] The JC thereafter applied for and obtained a garnishee order to show cause dated 21 June 2023 for the purpose of executing the said judgment.

This Court's Decision

[4] It is pertinent to first consider the applicable statutory provision that is O. 49 r. 1 of the Rules of Court 2012 ("ROC 2012"). It provides that:

> (1) Where a person (who is referred to as "the judgment creditor" in this Order) has obtained a judgment or order for the payment of money by some other person (who is referred to as "the judgment debtor" in this Order), not being a judgment or order for the payment of money into Court, and any other person within the jurisdiction (who is referred to as "the garnishee" in this Order), is indebted to the judgment debtor, the Court may, subject to the provisions of this Order and of any written law, order the garnishee to pay the judgment creditor the amount of any debt due or accruing due to the judgment debtor from the garnishee, or so much thereof as is sufficient to satisfy that judgment or order and the costs of the garnishee proceedings.

[5] The importance of establishing that the garnishee is indebted to the judgment debtor is illustrated in the Court of Appeal case of *Tiong Hoo Teck v. Wong Ho Enterprise Sdn Bhd & Ors* [2014] CLJU 272; [2014] 1 LNS 272; [2014] 4 MLJ 398. There, the judgment creditor merely averred in his affidavit in support the following:

> 4 To the best of my information and belief that the second and third defendants ('the said garnishees') are indebted to the said judgment debtor based on the financial statement filed by the first defendant with Companies Commission for the period end 31 October 2008, the second and third defendants herein are owing to the said judgment debtor. Pages 9-10, 20-21 of the said financial statement report are now produced and exhibited herewith marked P2.

[6] The Senior Assistant Registrar in that case allowed the application but on appeal to the High Court, the garnishee order was set aside on the grounds that the garnishee order was not precise enough for any debts due or accruing due to the garnishees because the sums or amount due from them were not set out nor ascertained in the order. The High Court referred to Forms 98, 99 and 100, which are the garnishee order to show cause, affidavit in support of garnishee order and garnishee order, respectively and held that these forms or documents require the amount due and owing from the garnishee to the debtor to be stated therein. The High Court held that this was so that the amount to be garnished or attached can be ascertained. However, the High Court found that the judgment creditor did not comply with these. The decision of the High Court was affirmed by the Court of Appeal.

(Also see *RT Telecom Sdn Bhd v. Telefleet Trading Group Sdn Bhd* [2019] CLJU 2093; [2019] 1 LNS 2093.)

[7] Much like the judgment creditor in *Tiong Hoo Teck* (*supra*), the JC in the present case merely stated the following in his affidavit in support of the application:

> 7. To the best of my information and belief, the JD maintains an account or accounts with the abovenamed Garnishee which is/are within the jurisdiction of this Court.

[8] In addition, both the second and fifth garnishees neither opposed nor took part in the proceedings. The record of appeal does not include any affidavits filed by the second and fifth garnishees.

[9] The question for this court is what was the evidence before the Magistrates' Court which showed that the second and fifth garnishees were in fact indebted to the JD as required under O. 49 r. 1 of the ROC 2012?

[10] It is unfortunate that the learned Magistrate did not appear to have this provision in mind when he decided as he did. This was apparent as there was nothing in his grounds of judgment, where this fundamental issue was discussed.

[11] It is true that under O. 49 r. 4 of the ROC 2012, if the garnishee does not attend or does not dispute the debt due or claimed to be due from him to the judgment debtor, the court may, subject to r. 7, make an order absolute against the garnishee. However, this does not relieve the court from first determining whether there is a debt due to the judgment debtor from the garnishee under r. 1 – see *Tiong Hoo Teck* (*supra*) and *RT Telecom Sdn Bhd v. Telefleet Trading Group Sdn Bhd* (*supra*). This is especially so in the present case when the JC did not even provide the grounds of his information and belief of the matters he averred as reproduced in [7] above contrary to the requirement in Form 98 in the First Schedule of the ROC 2012.

[12] It was the JD, who in her affidavit in opposition, disclosed that the second garnishee had written to her to inform that her savings accounts No. 160037025494 in the sum of RM8,635.97 had been frozen – see exh. "NA1". Indeed, the letter from the second garnishee dated 4 July 2023 does indicate that they have frozen the said account in compliance with the garnishee order to show cause. However, it should have immediately raised a red flag to the learned Magistrate that there was no mention by the second garnishee in the said letter about the sum of RM31,330.54. To me this suggests that the second garnishee was not even sure that they were indebted to the JD in the said sum. Had it been otherwise, the second garnishee would have also informed the JD that the particular account with the said sum of RM31,330.54 was also frozen or tagged, as it would appear that the second garnishee felt that they had a duty to inform the JD of the freezing of her savings account.

[13] As it is, the only evidence on this sum of RM31,330.54 was produced by the JD herself by exhibiting the bank statement of Legasi Bumiputera Enterprise, (exh. "NA-4(a)-(b)"). The JD said that this was not her personal bank account but a business account under the name of Legasi Bumiputera Enterprise which is not the same as the business she was trading in where she was sued by the JC earlier, namely Ayuni Optometri & Ayuni Housing Group.

[14] To this, the JC, in his affidavit in reply, averred that the JD was named and sued in her personal capacity since the full name and identity card of the JD was stated as the defendant/JD and that as long as the account was under the JD's own name, it would be subject to the garnishee proceedings.

[15] With respect, the JC's said averments are without any basis as the JD was sued not in her personal capacity but as the proprietor of the trading business known as Ayuni Optometri & Ayuni Housing Group. In addition, as noted earlier, the JC did not provide the grounds of his information and belief of the matters he averred in para. 7 of his affidavit in support. Thus, the JC could not have any basis to premise his averments on.

[16] In any event, with respect, it was not for the JC to rationalise as such as given the challenge by the JD, it was for the second garnishee to explain in particular as to why the account in the name of Legasi Bumiputera Enterprise was liable to be attached or to say it in another way, why the second garnishee was said to be indebted to the JD in relation to that particular account. Even if the second and fifth garnishees did not take part in the proceedings, it would have been incumbent upon the JC to obtain the necessary information from them on this matter, given the dispute by the JD on this issue. This was not done.

[17] In the commentary on O. 49 r. 1, it is stated in the *Singapore Civil Procedure* vol. 1 – 2020 edn, 49/1/52 as follows:

> (22) Banking account – A provisional order does not attach the balance of an account at a bank unless it correctly sets forth the name of the account as it stands in the books of the bank. Where the debtor has and operates an account in a name other than his own, that name must be inserted in the provisional order (see *Koch v. Mineral Ore Syndicate* (1910) 54 S.J. 600).

[18] Here, neither the garnishee order to show cause nor the garnishee order absolute made any reference to Legasi Bumiputera Enterprise at all.

[19] In my view, there being no evidence before the Magistrates' Court on the identity of the account holder in which the said sum of RM31,330.54 was kept, the requirement under O. 49 r. 1 of the ROC 2012 in as far as the said sum is concerned, was not fulfilled. It is also the same as regards the said sum of RM22 purportedly due to the JD from the fifth garnishee. This being the

A case, there was no basis for the learned Magistrate to grant the garnishee order absolute in as far as the said sums of RM31,330.54 and RM22 are concerned.

[20] This would have been the end of the matter had it not been the fact that the JD did not file a stay of execution against the garnishee order absolute and that the second and fifth garnishees have since paid the said sums to the JC pursuant to the said order.

[21] Learned counsel for the JC relied on the case of *Bank Kerjasama Rakyat (M) Bhd v. Koperasi Serbaguna Iman Malaysia Bhd; Maybank Islamic Bhd & Ors (Garnishees)* [2023] 2 CLJ 966 to contend that that was practically the end of the matter and that there was no avenue to have the said sums returned.

[22] In that case, the judgment creditor was successful in the appeals to the judge in chambers against the decision of the Senior Assistant Registrar to decline granting an order absolute against the garnishee banks in question. Before the decision of the appeal in judge in chambers, the funds in the bank accounts which were previously attached by the *order nisi* were taken out by the judgment debtor. The judgment creditor then applied to the court to garnish the funds taken out by the judgment debtor. The main issue before the court was whether these funds could still be garnished under O. 92 r. 4 of the Rules of Court 2012.

[23] Justice Atan Mustaffa held as follows:

> (1) When the SAR declined to grant the order absolute, it meant that the court had lifted the freezing order previously obtained through the granting of the *order nisi* and the garnishees, Maybank and Ambank, were no longer required to hold the JD's funds in the respective bank accounts. The JD would be able to access and use any funds being held as a result of the earlier *order nisi*. When the transferred amounts were first transferred, the JC did not file a stay application, the general position was that the JD was entitled to regard that the impugned transfers were within the JD's rights as accorded by the law and the court had no power to prevent further transfers of the monies in the JD's accounts without a stay of the decision.
>
> (2) The JC here was imploring upon the court to grant a relief, by making the retransfer order, to do something which was not provided by the Legislature. Given that the Legislature has not provided for such a relief to be granted, the court will be circumspect in using its inherent power to prevent the injustice and abuse of process as the JC so claimed. The backdrop of the episode of the impugned transfers was that the JC, after the SAR's decision declining to make an order absolute against Maybank and Ambank, did not apply or request for any stay of proceedings in any form. The JC was aware that once the court declined to grant the order absolute, the freezing order on the monies in the JD's accounts was lifted and the JD would be able to access and use any funds that were being

held as a result of the earlier *order nisi.* This failure to apply for a stay of proceedings, which would have been considered by the court and would be allowed if there were special circumstances, was an oversight by the JC. The law provides for this relief (the stay pending appeal) and the JD had failed to avail itself of it. The JC's application for the retransfer order under the inherent powers of the court was also a form of abuse because the JC itself had omitted to apply for the stay and only after it was discovered that the funds that subsequently flowed into the JD's account had been taken out that it applied for the retransfer order to rectify this omission. Under these circumstances, this court could not exercise its inherent power to make the retransfer order as prayed for by the JC.

[24] Both learned counsels for the JC and the JD were not able to provide this court additional authorities on this issue, however, my own research led me to the Supreme Court case of *Tai Kwong Goldsmiths & Jewellers (In Receivership) v. Yap Kooi Hee & Ors* [1994] 4 CLJ 959; [1995] 1 MLJ 1. In that case, the appellant, which was a partnership, was dissolved and a receiver had been appointed by the court. After the appointment of the receiver, three depositors of the partnership obtained garnishee orders against the moneys in the hands of the receiver but without leave of the court to take out the garnishee proceedings. The court allowed the receiver's appeal, *inter alia*, holding as follows:

In our judgment, each of those three garnishee orders having been obtained without leave were improperly obtained and in proceeding to obtain them and in obtaining them, the appellants were in effect in contempt of the court that appointed the receiver. The garnishee orders and each of them are of no effect. **If there had been any amounts paid to the garnishors pursuant to the garnishee order such amounts should be forthwith repaid to the receiver.** (emphasis added)

[25] Learned counsel for the JC distinguished this case on the grounds that there, the issue went to the "root of the proceedings", namely that the garnishors failed to obtain leave beforehand. However, in the present case, it was argued that the JD was, at all material times present during the whole proceedings. In addition, learned counsel for the JC contended that the JD in her affidavit in opposition herself admitted that the account under the name Legasi Bumiputera Enterprise belonged to her. Thus, according to learned counsel further, the duty shifted to her to show that the money in the said account belonged to someone else and that she had no control over it.

[26] With respect, I cannot agree with learned counsel for the JC on both points. First of all, while it is true that in *Tai Kwong Goldsmiths & Jewellers* (*supra*), the determinative factor was that there was no leave obtained by the garnishors, I do not see why it should make a difference, especially where such as in the present case, the garnishee order absolute on the sums of RM31,330.54 and RM22 was, respectfully, demonstratively wrongly made. What is important is that the Supreme Court did not find it a hindrance to order that the garnished monies which had been paid be repaid.

[27] On this score, the case of *Bank Kerjasama Rakyat (M) Bhd* (*supra*) is distinguishable as there, the issue was whether the court could still grant a garnishing order against the funds which the judgment debtor had already taken out. At the material time, there was no restriction for the judgment debtor to do so as the court had lifted the freezing order previously obtained through the granting of the *order nisi*. Thus, it was understandable that the High Court was of the view that there was no basis to grant the re-transfer relief sought for by the judgment creditor. In the present case, it is a matter of righting a wrong which the court is well-clothed with inherent jurisdiction to do so.

[28] As regards the contention that it was the duty of the JD to show that the money in the Legasi Bumiputera Enterprise account belonged to someone else, with respect, this ignores the fact that it is the JC who has the legal burden to persuade the court that there is (i) a debt due to the judgment debtor from the garnishee and (ii) a debt which is "accruing due" to the judgment debtor from the garnishee to justify the garnishment of the sum of money in question – see *Tesco Stores (Malaysia) Sdn Bhd v. Ananda Kumar Krishnan* [2017] 5 CLJ 315. If the JC has not discharged that burden, then there is nothing for the JD to rebut. Here, the JD having challenged the propriety of attaching the Legasi Bumiputera Enterprise account, the burden was on the JC to show that it was justifiable to garnish the money in that account by showing that it was liable to be attached in any event. The JC failed to discharge that burden.

Conclusion

[29] I am aware that having paid the monies to the judgment creditor, a garnishee is in law discharged under O. 49 r. 8 of the ROC 2012 which provides that:

> Any payment made by a garnishee in compliance with an order absolute under this Order, and any execution levied against him in pursuance of such an order, shall be a valid discharge of his liability to the judgment debtor to the extent of the amount paid or levied notwithstanding that the garnishee proceedings are subsequently set aside or the judgment or order from which they arose reversed.

[30] However, given the circumstances of this case, namely that there is no evidence to show that the said sums of RM31,330.54 and RM22 are monies which are due from the second and fifth garnishees respectively to the JD, I am of the view that the appropriate order can only be that the said sums be returned to the respective accounts in the second and fifth garnishees from which the monies were paid out to the JC.

[31] Accordingly, I hereby allow the appeal in part and order as follows:

(i) that the decision of the Magistrates' Court in granting the garnishee order absolute in respect of the said sums of RM31,330.54 and RM22 is set aside;

(ii) that the JC is to return the said sums of RM31,330.54 and RM22 to the second and fifth garnishees respectively within 14 days of this order;

(iii) that the second and fifth garnishees are to reinstate the said sums of RM31,330.54 and RM22 in the accounts from which the said sums were paid out within seven days from their receipts of the said sums;

(iv) that the JC pays the JD costs of this appeal subject to allocatur; and

(v) the parties are at liberty to apply for the purpose of giving effect of these orders.